Filed 3/18/19 P. v. Estrada CA5
Opinion after recall of remittitur

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ESTRADA et al., Defendants and Appellants.	F071935 (Super. Ct. Nos. DF011706A & DF011706B) **OPINION**

APPEAL from judgments of the Superior Court of Kern County. Steven M. Katz, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant Michael Estrada.

Robert Navarro, under appointment for the Court of Appeal, for Defendant and Appellant Efrain Lopez.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein, Paul A. Bernardino, Alice Su and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

I. Procedural History

The offense underlying the convictions in this case arose out of a prison yard fight between three inmates. Codefendants Michael Estrada and Efrain Lopez were each convicted of one count of assault with a deadly weapon likely to produce great bodily injury (GBI), in violation of Penal Code section 245, subdivision (a)(1).[1] In a bifurcated proceeding, the trial court found true that Estrada had six prior serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), two prior serious felony convictions triggering the five-year enhancement under the Three Strikes law (§ 667, subd. (a)(1)), and served a prior prison term (§ 667.5, subd. (b)). The court found true that Lopez had one prior serious or violent felony conviction within the meaning of the Three Strikes law (§§ 667, subds. (c)–(j), 1170.12, subds. (a)–(d)), and one prior serious felony conviction triggering application of the five-year enhancement under the Three Strikes law (§ 667, subd. (a)(1)).

The trial court sentenced Estrada to an indeterminate term of 25 years to life under the Three Strikes law, plus a consecutive determinate term of 11 years for the 2 five-year serious felony enhancements and the one-year prior prison term enhancement. The court sentenced Lopez to the upper term of eight years, plus an additional consecutive term of five years for the serious felony enhancement for a total determinate term of 13 years.

We issued an opinion affirming Estrada's and Lopez's judgments on July 18, 2018. (*People v. Estrada* (July 18, 2018, F071935) [nonpub. opn.].) Estrada's petition for review was denied by the California Supreme Court on October 24, 2018, and the remittitur issued on October 25, 2018. Estrada thereafter filed an application to recall the remittitur and file an argument in light of then pending amendments to sections 667,

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1 All further statutory references are to the Penal Code.

subdivision (a)(1), and 1385, which would permit trial courts, in furtherance of justice, to strike prior serious felony conviction enhancements. (Sen. Bill No. 1393, approved by Governor, Sept. 30, 2018 (2017-2018 Reg. Sess.) ch. 1013, §§ 1–2 (Senate Bill No. 1393 or Sen. Bill No. 1393.) On December 17, 2018, after the People filed a response, we directed our clerk's office to file Estrada's supplemental brief, granted his motion to recall the remittitur, vacated our opinion and ordered Lopez to file a response. (Cal. Rules of Court, rule 8.272(b)(1).) Supplemental briefing is now complete.

II. Claims on Appeal

Estrada and Lopez challenge their assault convictions as unsupported by substantial evidence on the "deadly weapon" element, and they seek a reduction of the offense to simple assault (§ 240). Additionally, Estrada claims the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of simple assault and in instructing the jury on "inherently deadly" weapons under CALCRIM No. 875; his trial counsel rendered ineffective assistance of counsel in failing to object to testimony that the inmate-manufactured weapons were deadly weapons; and these errors, cumulatively, violated his right to a fair trial. Finally, Estrada claims the trial court's imposition of a one-year prior prison term enhancement was unauthorized.

In supplemental briefing, Estrada and Lopez request this matter be remanded so that the trial court may exercise its discretion whether to strike their prior serious felony conviction enhancements given the recent amendments to sections 667, subdivision (a)(1), and 1385, effective January 1, 2019, pursuant to Senate Bill No. 1393.

As discussed, *post*, the People do not oppose Estrada's request for remand of this matter so that the trial court may exercise its discretion whether to strike his prior felony conviction enhancement, but they otherwise dispute his entitlement to any relief on his claims. The People dispute Lopez's entitlement to any relief on his claims, including his request for remand pursuant to Senate Bill No. 1393.

We reject Estrada's and Lopez's substantial evidence challenge, and Estrada's claims of instructional error as to CALCRIM No. 875, ineffective assistance of counsel, cumulative error and sentencing error. Regarding the trial court's failure to instruct on simple assault, while we conclude the trial court committed technical error, the error did not result in prejudice to Estrada. Finally, we agree with Estrada and Lopez that this matter should be remanded so that the trial court may exercise its discretion in the first instance with respect to whether to strike their prior serious felony conviction enhancements. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.) Except as modified herein, the judgments are affirmed.

FACTUAL SUMMARY

A. Prosecution's Case

On the morning of October 31, 2013, Correctional Officer Lopez observed a physical fight in the yard at Kern Valley State Prison between Estrada, Lopez and the victim, approximately 30 yards from his position in the tower.[2] Officer Lopez ran along the catwalk toward the fight and, when he stopped, he was approximately 30 feet away from the fighting inmates. Officer Lopez testified he saw Estrada and Lopez attacking the victim and striking him in the head and upper torso with closed fists. All the inmates in the yard obeyed Officer Lopez's order to get down except Estrada, Lopez and the victim. After yelling at them to get down a second time, Officer Lopez aimed at Estrada's thigh and fired a nonlethal foam round.[3] Estrada stopped fighting, threw an inmate-manufactured weapon and got down on the ground.

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[2] We refer to Correctional Officer Lopez as Officer Lopez to avoid confusion between him and defendant Efrain Lopez.

[3] Officer Lopez was armed with a weapon that fires foam rounds and wood baton rounds, which he described as "less-than-lethal" ammunition.

Lopez and the victim continued fighting. After Officer Lopez fired a wood baton round, Lopez threw his weapon and got down on the ground, along with the victim. Two plastic weapons, one five inches long and the other six inches long, were recovered from the areas where Estrada and Lopez were seen tossing weapons. A sharpened metal tip was recovered from the waistband of the victim's boxer shorts. The tip appeared to fit a groove in Lopez's weapon, which also had a piece of metal still embedded in it.

Sotelo, a correctional sergeant, was an eyewitness to the fight and also testified as an expert witness. He explained that a two-on-one fight sends the message the victim is being punished. He also explained that the weapons employed by Estrada and Lopez were inmate-manufactured weapons, which is any item altered into something solely used to cause harm. Sotelo testified inmate-manufactured weapons are deadly weapons because they serve no other purpose than to cause serious bodily injury.

Sotelo testified he heard Officer Lopez yell for the yard to get down and, from approximately 40 feet away, he saw Estrada and Lopez attacking the victim. He saw the victim did not have a weapon, but Estrada did. Estrada and Lopez were striking the victim in the back with sidearm motions, indicating they were stabbing him. After Estrada threw his weapon and got down on the ground, Lopez continued to attack the victim, who then took a more aggressive defensive stance against his now solo attacker. Sotelo saw the victim punching Lopez consistent with the use of his knuckles. After Sotelo got closer and was about 15 feet away, he saw a weapon in Lopez's hand. He testified Lopez and the victim did not respond to the discharge of officers' weapons, but they stopped fighting once a correctional officer discharged his pepper spray.

Medical staff evaluated Estrada, Lopez and the victim after the fight. On one hand, Estrada had some swelling and redness, and on one forearm, he had a small skin flap and some swelling and redness. Lopez had a cut on his head and on his hand, he had a skin flap and some swelling, redness and bleeding. The victim had multiple cuts to his front and back, abrasions to his knee and elbow, and a reddened ear. The majority of his

wounds were to his upper back and abdominal area. Lopez and the victim were also "decontaminated," a process employed to remove pepper spray. On cross-examination, the licensed vocational nurse who examined the victim testified she did not note any puncture wounds on her report, but stated it is hard to distinguish between punctures, abrasions and cuts so staff just write down what they see. She also testified she notes it in her report if someone needs further treatment, and her report on the victim does not note a need for further treatment.

The victim refused to provide a statement to investigators and did not testify but, after the commencement of trial, he permitted an investigator to take photographs of his body. Those photographs showed some possible small, light scars on the victim's lower back and lower hip.

B. Defense Case

Estrada rested on the evidence.

Lopez, who represented himself, called four correctional officers and one correctional sergeant to testify. Castro, a correctional officer, saw Estrada and Lopez striking the victim with closed fists from approximately 220 feet away. At his closest, he was 36 and one-half feet away, but the fight had stopped by then. He testified he did not see anyone with a weapon or throwing a weapon. He also did not see anyone break off from the fight early.

Gonzalez, a correctional sergeant, also saw Estrada and Lopez striking the victim in the head and back, but did not see any weapons. He was 80 to 100 yards away from the fight at first, but ran to form a skirmish line and was 20 yards away at that point. He testified he did not recall if Lopez threw a weapon, but stated he would have written it in his report. He also testified he did not see Estrada throw a weapon or disengage from the fight before the others did.

Gaddis, a correctional officer, was initially 100 yards away from the fight. He neither saw Lopez with a weapon nor saw Lopez or Estrada toss a weapon.

Campas, a correctional officer, was 20 feet away when he first saw Estrada and Lopez attacking the victim. He was on the opposite side of a chainlink fence and the victim was running toward the fence with Lopez in pursuit. From approximately seven feet away, Campas sprayed the victim and Lopez with pepper spray. Campas testified he did not see Lopez with a weapon or toss a weapon; and he saw Estrada on the ground, but did not see Estrada toss a weapon or get down on the ground. On cross-examination by the prosecutor, Campas testified pepper spray is orange-brown in color and blocks the view. He also testified it was possible the victim, who was running toward him and was closest to him, blocked his view of Lopez.

Finally, Herrera, a correctional officer, testified he saw Lopez and the victim fighting from approximately 30 feet away and from an elevation of 20 to 25 feet. He aimed a nonlethal round at Lopez's upper thigh and fired, but did not see where the round, which is the size of a handball, hit. He did not see any weapons and he did not see Estrada, but he testified his attention was divided.

DISCUSSION

I. Sufficiency of Evidence Supporting Assault Convictions

A. Background

Estrada and Lopez were convicted of committing "assault upon the person of another with a deadly weapon or instrument other than a firearm …." (§ 245, subd. (a)(1).) The California Supreme Court has defined a deadly weapon within the meaning of the section 245, subdivision (a)(1), as "'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly … is used as

such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1065; *In re D.T.* (2015) 237 Cal.App.4th 693, 698–699; *People v. Brown* (2012) 210 Cal.App.4th 1, 6–7.)

Estrada and Lopez claim their convictions are not supported by substantial evidence as to the "deadly weapon" element of the offense. They contend the inmate-manufactured weapons at issue in this case were neither inherently deadly nor capable of use in a manner likely to produce death or GBI. The People disagree on both points, and we concur.

B. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055, cert. den. *sub nom. Lam Thanh Nguyen v. California* (2016) ___ U.S. ___ [136 S.Ct. 1714].) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Ibid.*) "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt ….'" (*People v. Nguyen*, *supra*, at pp. 1055–1056.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio*, *supra*, at p. 357.)

C. Analysis

1. Inherently Deadly Weapons

In support of their argument the inmate-manufactured weapons were not inherently deadly, Estrada and Lopez point out that knives and other sharp objects are not considered inherently deadly. However, as we explain, this argument overlooks a material distinction between the weapons at issue here and knives and other sharp objects such as pencils and screwdrivers. (E.g., *In re D.T.*, *supra*, 237 Cal.App.4th at p. 700 [knife used as a deadly weapon]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1470–1474 [sharp pencil held to victim's neck a deadly weapon]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1106–1108 [screwdriver not inherently deadly weapon, but deadly when used to hold police officers at bay].)

As previously stated, the California Supreme Court has recognized two categories of deadly weapons: those that are inherently deadly, or deadly as a matter of law, and those that are not but may be used in a manner likely to produce death or GBI. (*People v. Aguilar*, *supra*, 16 Cal.4th at pp. 1028–1029; accord, *In re D.T.*, *supra*, 237 Cal.App.4th at pp. 698–699, citing *People v. Brown*, *supra*, 210 Cal.App.4th at pp. 6–7.) The foundation for the California Supreme Court's recognition of two categories of weapons that will satisfy the "deadly weapon" element of assault with a deadly weapon was provided by *People v. Graham* (1969) 71 Cal.2d 303, in which the high court explained "'that a distinction should be made between two classes of "dangerous or deadly weapons." There are, first, those instrumentalities which are weapons in the strict sense of the word, and, second, those instrumentalities which are not weapons in the strict sense of the word, but which may be used as such. The instrumentalities falling in the first class, such as guns, dirks and blackjacks, which are weapons in the strict sense of the word and are "dangerous or deadly" to others in the ordinary use for which they are designed, may be said as a matter of law to be "dangerous or deadly weapons." This is true as the ordinary use for which they are designed establishes their character as such.

The instrumentalities falling into the second class, such as ordinary razors, pocket knives, hatpins, canes, hammers, hatchets and other sharp or heavy objects, which are not weapons in the strict sense of the word and are not "dangerous or deadly" to others in the ordinary use for which they are designed, may not be said as a matter of law to be "dangerous or deadly weapons."'" (*Id.* at pp. 327–328, quoting *People v. Raleigh* (1932) 128 Cal.App. 105, 108.)

In this case, the weapons used by Estrada and Lopez were recovered and shown to the jury. Estrada's weapon was five inches long and Lopez's weapon was six inches long. The items were plastic with sharpened points, and the jury was informed that inmates take material from items such as TV's or CD cases, melt the plastic down and sharpen it to make weapons. Additionally, the jury was informed that inmates sometimes melt metal into the plastic and sharpen it to strengthen the weapon. Witnesses testified that a sharpened metal tip fell from the waistband of the victim's boxer shorts after the fight, and Lopez's weapon had a piece of metal still embedded in it and a groove consistent in fit with the broken metal tip.[4]

Sotelo also testified that an inmate-manufactured weapon is "[a]ny item that's been altered in a way to make it the only use for that item to be to harm another individual" and that "[t]here is no other purpose behind an inmate manufactured weapon, except to cause serious bodily injury to another individual."[5] Under these circumstances,

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[4] Lopez's argument that "there was no evidence that … defendants ever possessed the tip, much less whether it was at any time attached to either of the plastic inmate manufactured weapons" ignores evidence that Estrada and Lopez were seen tossing the weapons later located in the yard, a metal tip fell out of the victim's boxer shorts after the attack, and Lopez's weapon had a piece of metal still embedded in it and a groove in which the broken-off metal tip appeared to fit. As such, there was clearly sufficient evidence supporting a reasonable inference that the metal tip came from Lopez's weapon.

[5] In his reply brief, Lopez asserts Sotelo's testimony was not credible. Lopez did not object at trial, however, and Sotelo's credibility was for the jury to determine. (*People v. Sanchez* (2016) 63 Cal.4th 665, 675.)

we conclude Estrada's and Lopez's weapons are readily distinguishable from other sharp, pointed items that are designed for a purpose other than use as a weapon, such as knives. Here, the inmate-manufactured weapons were weapons in the strict sense; that is, "the ordinary use for which they are designed establishes their character as such." (*People v. Aguilar, supra,* 16 Cal.4th at p. 1029; see *People v. Graham, supra,* 71 Cal.2d at pp. 327–328.) The cases defendants rely on for their contrary position address items that are not weapons in the strict sense because they "'are not "dangerous or deadly" to others in the ordinary use for which they are designed.'" (See *People v. McCoy* (1944) 25 Cal.2d 177, 188 [knife]; *People v. Pruett* (1997) 57 Cal.App.4th 77, 85 [pocketknife]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [three-pronged metal fork]; *People v. Kersey* (1957) 154 Cal.App.2d 364, 366 [pocketknife]; *People v. Russell* (1912) 19 Cal.App. 750, 753 [knife].) As the inmate-manufactured weapons used here had no other purpose beyond their use as weapons, we agree with the People the evidence is sufficient to support a finding the weapons were inherently deadly.

2. Weapons Likely to Produce Death or GBI

As well, we agree with the People the evidence was sufficient to support a finding the weapons were capable of use in a manner likely to produce death or GBI. This case did not involve speculative or cursory testimony, as Estrada suggests. In addition to testimony regarding the weapons and photographs of the weapons, the jury viewed the physical weapons themselves.

We also find Estrada's and Lopez's focus on the victim's injuries misplaced given the facts of this case. While Estrada and Lopez did not kill or inflict GBI on the victim, he suffered multiple cuts and abrasions as a result of the attack. A victim's injuries are merely a factor for the jury to consider, and the absence of more serious injury does not establish that a weapon is not deadly within the meaning of the statute. (*In re D.T., supra,* 237 Cal.App.4th at p. 702; *People v. Page, supra,* 123 Cal.App.4th at p. 1472.) Physical contact with the victim is not an element of the offense and the question for the

factfinder is whether the weapon is capable of and likely to cause death or GBI.[6] (*In re B.M.* (2018) 6 Cal.5th 528, 533; *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1028; accord, *People v. Brown*, *supra*, 210 Cal.App.4th at pp. 7–8; *People v. Page*, *supra*, at pp. 1472–1473.) A hard object with a pointed tip is certainly capable of puncturing flesh and causing death or GBI (*In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1497), and the jury in this case could have reasonably concluded it was merely fortuitous the victim avoided more serious injury (*People v. Brown*, *supra*, at p. 8).

We are not persuaded otherwise by Estrada's and Lopez's reliance on *In re Brandon T.*, *supra*, 191 Cal.App.4th 1491 and *People v. Beasley* (2003) 105 Cal.App.4th 1078. The weapon in *In re Brandon T.* was a rounded butter knife with a serrated edge, which broke when Brandon tried to cut the victim's cheek and throat with it. The victim sustained what he described as welts from the knife, and an officer described the victim's injury as a small scratch. (*In re Brandon T.*, *supra*, at pp. 1496–1497.) The Court of Appeal concluded the knife was not capable of producing death or GBI. (*Ibid.*) It focused on the fact the knife broke from the pressure applied and the fact the end of the knife was round. (*Id.* at pp. 1497–1498.) However, the court expressly recognized "[t]here can be no doubt that a pointed object aimed at the victim's neck is capable of producing death or great bodily injury." (*Id.* at p. 1498.) Most obviously, the weapons here had sharpened points, in material contrast with the rounded tip weapon used in *In re Brandon T.*

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6 Lopez points out the prosecution dismissed the charge of premeditated and deliberate attempted murder and the sentence enhancement for infliction of GBI, and Sotelo testified at the preliminary hearing that, based on the evidence, he believed the assault was a "checking" intended to get the victim off the yard. This argument offers no assistance to Lopez, however, as the issue is whether the evidence presented at trial, viewed in the light most favorable to the prosecution, was sufficient to support a finding that Estrada and Lopez assaulted the victim with a deadly weapon. Neither the dismissal of the attempted murder charge and the sentence enhancement allegation nor Sotelo's preliminary hearing testimony regarding the "checking" was before the jury for consideration.

In *People v. Beasley*, *supra*, 105 Cal.App.4th 1078, the Court of Appeal found the evidence insufficient to support the defendant's convictions for assault with a deadly weapon arising out of beatings inflicted with a broomstick and a hollow vacuum cleaner attachment. (*Id.* at p. 1088.) Evidence regarding the nature of the items was limited to the victim's testimony, which the appellate court found too cursory to support a finding that either was a deadly weapon. (*Id.* at pp. 1087–1088.) The victim did not describe the degree of force used; the composition, weight or rigidity of the broomstick; or the size and shape of the vacuum attachment. (*Ibid.*) The court also concluded the injuries—bruising to the victim's back, arms and shoulders—were not sufficient to show the defendant used the items as deadly weapons. (*Id.* at p. 1088.) This case, however, does not involve similarly cursory testimony, and the jury saw the weapons used, unlike in *People v. Beasley*. Although a factor for the fully informed jury to consider, the absence of more serious injury need not be accorded the great weight urged by Estrada and Lopez.

Our conclusion in this case is further supported by the California Supreme Court's recent decision in *In re B.M.*, *supra*, 6 Cal.5th 528. In that case, the high court reversed the Court of Appeal, which had criticized *In re Brandon T.* as wrongly decided, and reiterated, "[C]onsistent with settled principles, … for an object to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury. The extent of any damage done to the object and the extent of any bodily injuries caused by the object are appropriate considerations in the fact-specific inquiry required by section 245[, subdivision](a)(1). But speculation without record support as to how the object could have been used or what injury might have been inflicted if the object had been used differently is not appropriate." (*Id.* at p. 530.)

In *In re B.M.*, the juvenile grabbed a butter knife from the kitchen counter in anger and made several downward slashing motions against her sister's legs, which were covered with a blanket. (*In re B.M.*, *supra*, 6 Cal.5th at p. 531.) The California Supreme

Court reversed the juvenile court's finding that B.M. used the knife as a deadly weapon and explained, "Under any plausible interpretation of the term 'likely,' the evidence was insufficient to establish that B.M.'s use of a butter knife against her sister's blanketed legs was '"likely to produce … death or great bodily injury."'" (*Id.* at p. 536.) In reaching this conclusion, the court considered that the knife was not sharp; it was used only on the victim's legs, which were covered by a blanket; and the amount of force used was insufficient to cut through the blanket, let alone seriously injure the victim. (*Id.* at pp. 536–537.) As we have discussed and in contrast with *In re B.M.*, the weapons in this case had sharp, pointed tips and Estrada's and Lopez's blows targeted vulnerable areas: the victim's head and upper torso. (*Id.* at pp. 536–538.)

We therefore reject Estrada's and Lopez's challenges to their convictions as unsupported by substantial evidence, and we affirm. So long as the convictions are supported by sufficient evidence, it is of no consequence that the evidence might also have permitted the jury reach a contrary conclusion. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890; *People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

II. Instructional Errors

A. Failure to Instruct Sua Sponte on Simple Assault

The trial court instructed the jury on simple battery (§ 242), but not on simple assault (§ 240). (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747; *People v. Page*, *supra*, 123 Cal.App.4th at p. 1474.) Estrada claims the court had a duty to instruct sua sponte on simple assault because it is a lesser included offense of assault with a deadly weapon, and the failure to do so resulted in a miscarriage of justice.[7] The People agree simple assault is a lesser included offense of assault with a deadly weapon, but contend

[7] Simple battery is not a lesser included offense of assault with a deadly weapon, although it was described as such by the trial court. (*In re Robert G.* (1982) 31 Cal.3d 437, 441; *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 11.)

there was no error because the instruction was not supported by substantial evidence and any error was harmless.

1. Standard of Review

"'A trial court has a sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." [Citation.] Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, *but not the greater*, offense. "The rule's purpose is ... to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." [Citation.] In light of this purpose, the court need instruct the jury on a lesser included offense only "[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of" the lesser offense.'" (*People v. Landry* (2016) 2 Cal.5th 52, 96, quoting *People v. Shockley* (2013) 58 Cal.4th 400, 403–404; accord, *People v. Simon* (2016) 1 Cal.5th 98, 132.) "On appeal, we independently review whether a trial court erroneously failed to instruct on a lesser included offense." (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; accord, *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

2. Technical Error

We cannot discern from the record whether any discussion occurred regarding an instruction on simple assault, but Estrada argues that, notwithstanding the related instruction on simple battery, the trial court had a duty to instruct on simple assault. He contends there was substantial evidence from which a reasonable jury could have concluded either he did not have a weapon or the weapon he employed was not deadly. Relying on *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*), Estrada asserts that instructing the jury on simple battery does not excuse the failure to instruct on simple assault.

In *Breverman*, the California Supreme Court stated, "We have noted the danger of all-or-nothing verdict choices as a basis for the instructional rule. However, we have never intimated that the rule is satisfied once the jury has *some* lesser offense option, so that the court may limit its sua sponte instructions to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, as we have expressly indicated, the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the *full range of possible verdicts*' included in the charge, regardless of the parties' wishes or tactics. [Citation.] The inference is that *every* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*Breverman, supra,* 19 Cal.4th at p. 155; accord, *People v. Smith* (2013) 57 Cal.4th 232, 239–240.)

Thus, the inquiry is whether there is substantial evidence from which the jury could have found Estrada committed simple assault. Lopez presented testimony from numerous correctional officers who did not see Estrada and Lopez with weapons and did not see them toss any weapons. However, the victim sustained some injuries in the attack and even the witnesses who did not see any weapons testified they saw Estrada and Lopez hitting the victim. Thus, the focus in this case was whether Estrada and Lopez employed weapons in the assault rather than whether an assault occurred at all or whether they were participants.

Given that simple assault is a lesser included offense of assault with a deadly weapon and multiple witnesses testified to observing the fight but not seeing any weapons, we are constrained to conclude the trial court committed technical error in failing to instruct the jury on simple assault. To conclude otherwise, as the People urge, would require us to discount the testimony of Lopez's witnesses, which we cannot do. (*Breverman, supra,* 19 Cal.4th at p. 162 [in determining whether substantial evidence required a trial court to instruct on a lesser offense, reviewing courts should not evaluate witness credibility]; accord, *People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In this context,

we determine only the bare legal sufficiency of the evidence and not its weight. (*Breverman*, *supra*, at p. 177.) Nevertheless, we find the error harmless.

2. Error Harmless

The trial court's failure to instruct the jury sua sponte on a lesser included offense is error under state law and reviewed for miscarriage of justice under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 837). (*Breverman*, *supra*, 19 Cal.4th at p. 149; accord, *People v. Hicks* (2017) 4 Cal.5th 203, 215.) Under this standard, "'a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.'" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) The test "'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.'" (*Id.* at p. 956, quoting *Breverman*, *supra*, at p. 177.)

We find Estrada's argument that he was prejudiced by the trial court's failure to instruct on simple assault unpersuasive. This was a strong case for the prosecution, and the evidence of Estrada and Lopez attacking the victim was uncontroverted. Officers Lopez and Sotelo saw Estrada and Lopez with weapons in hand striking the victim in a sidearm, or side swing, motion, indicting they were attacking him with weapons in fists rather than merely punching him. They also saw Estrada and Lopez toss their weapons, which were recovered. Additionally, a broken metal tip that fit Lopez's weapon fell from the victim's boxer shorts, and the victim sustained multiple cuts in areas where witnesses saw him struck by Estrada and Lopez.

Although Estrada contends the jury's rejection of battery in favor of assault with a deadly weapon does not matter to the assessment of prejudice, we are unpersuaded. For

this proposition, defendant cites *People v. Brown* (2016) 245 Cal.App.4th 140, 155–156, which in turn cites *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335–1336. The linchpin to Estrada's argument is the following statement in *People v. Brown*: "[I]n assessing prejudice, 'it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence.' (*People v. Racy*[, *supra*, at p.] 1335.) To hold otherwise would undermine the very purpose of the sua sponte rule. (*Breverman*[, *supra*,] 19 Cal.4th [at p.] 178, fn. 25.)" (*People v. Brown*, *supra*, at p. 156.) However, both *People v. Brown*, *supra*, at pages 150–151 and *People v. Racy*, *supra*, at pages 1335–1336, were cases in which the jury was confronted with the choice to either convict on the charged offense or acquit.[8]

This case did not involve an election between either conviction on assault with a deadly weapon or acquittal. If the jury did not believe Estrada was armed with a weapon, or at least was not convinced beyond a reasonable doubt that he had a weapon or that the weapon was deadly, as he argues, it had the option of convicting him of battery. It did not do so, however, signifying its rejection of the defense theory that Estrada and Lopez were not armed. We are mindful that giving the jury this other choice did not relieve the

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8 *People v. Brown*, *supra*, 245 Cal.App.4th at page 156, and *People v. Racy*, *supra*, 148 Cal.App.4th at pages 1335–1336, rely on the footnote in *Breverman* in which the court responded to Justice Mosk's dissent as follows: "[W]e disagree with Justice Mosk's assertion that if the defendant was convicted of the charged offense on substantial evidence, any error in failing to instruct on a lesser included offense must be *harmless per se*. Justice Mosk's premise is that such error affects only the lesser offense of which the defendant was not convicted. But the very purpose of the rule is to allow the jurors to convict of *either* the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice. Depending on the circumstances of an individual case, such an examination may reveal a reasonable probability that the error affected the outcome in this way." (*Breverman*, *supra*, 19 Cal.4th at p. 178, fn. 25.)

trial court of its instructional duty as to lesser included offenses nor is it determinative of harmlessness (*People v. Brown*, *supra*, 245 Cal.App.4th at p. 155; accord, *People v. Smith*, *supra*, 57 Cal.4th at pp. 239–240) but, under the circumstances, Estrada fails to persuade us the jury's rejection of simple battery is irrelevant to the analysis of prejudice (see *Breverman*, *supra*, 19 Cal.4th at pp. 177–178 ["[A] determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial."]).

We conclude that in this case, the failure to instruct the jury on simple assault did not result in prejudice to Estrada. Given the strength of the prosecution's case and the jury's rejection of simple battery as an alternative, we find no reasonable probability he would have obtained a different outcome had the instruction been given.

B. Instruction on Inherently Deadly Weapon

1. Background

Next, the trial court instructed the jury as follows pursuant to CALCRIM No. 875:

> "The defendants are charged with assault with a deadly weapon, to wit: An inmate manufactured weapon, in violation of … Section 245(a)(1). To prove that the defendants are guilty of this crime, the People must prove that the defendants did an act with a deadly weapon that, by its nature, would directly and probably result in the application of force to a person; two, the defendants did that act willfully; three, when the defendants acted, they were aware of the facts that would lead a reasonable person to realize that their acts, by its nature, would directly and probably result in an application of force to someone; and, four, when the defendants acted, they had the present ability to apply force with a deadly weapon.
>
> "Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law or hurt someone else or gain any advantage.
>
> "The term 'application of force' and 'apply force' means to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person,

including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. The touching can be done indirectly or by causing an object to touch the other person.

"The People are not required to prove that the defendant actually touched someone. The People are not required to prove that the defendants actually intended to use force against someone when they acted.

"No one needs to actually have been injured by the defendants' acts. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendants committed an assault.

"*A deadly weapon is an object, instrument, or weapon that is inherently deadly or one that is used in such a way that is capable of causing and likely to cause death or great bodily injury*.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." (Italics added.)

Estrada challenges this instruction on the ground that it was legally incorrect with respect to defining deadly weapon as one that is "inherently deadly." Relying on *People v. Green* (1980) 27 Cal.3d 1, 69 (*Green*), disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3, Estrada asserts the prosecutor's reliance, in part, on the theory that the inmate-manufactured weapons were inherently deadly was legally incorrect and, therefore, the trial court's inclusion of "inherently deadly" in its instruction on deadly weapons was necessarily legally incorrect, entitling him to reversal.[9]

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9 The so-called *Green* rule is as follows: "'When the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122, quoting *Green*, *supra*, 27 Cal.3d at p. 69.) However, "[i]f the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton*, *supra*, at p. 1129.)

2. No Error

The recent decisions in *People v. Stutelberg* (2018) 29 Cal.App.5th 314 (*Stutelberg*) and *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, No. S248105 (*Aledamat*) lend support for Estrada's argument. In both cases, which involved box cutters, the trial courts had instructed the jury, pursuant to CALCRIM 875, that a deadly weapon "'is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.'"[10] (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 317; accord, *Aledamat*, *supra*, at p. 1152, review granted.) In *Aledamat*, the Court of Appeal recognized that CALCRIM No. 875 is correct in the abstract (*Aledamat*, *supra*, at p. 1153, review granted, citing *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176), but determined that because a box cutter is a type of knife designed to cut things rather than people, it cannot, as a matter of law, be an inherently deadly weapon (*Aledamat*, *supra*, at pp. 1153–1154, review granted). The Court of Appeal in *Stutelberg* agreed. (*Stutelberg*, *supra*, at p. 317.)

The Courts of Appeal did not apply the same standard of review, however. In *Aledamat*, the court, applying the *Green* rule, concluded the error was prejudicial and it was compelled to reverse because it could not determine from the record whether the jury relied on a legally valid theory—that the box cutter was capable of use in a manner likely to result in death or GBI—or a legally invalid theory—that the box cutter was an inherently deadly weapon.[11] (*Aledamat*, *supra*, 20 Cal.App.5th at pp. 1153–1155, review

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10 *Stutelberg* also involved a deadly weapon enhancement, on which the trial court instructed the jury pursuant to CALCRIM No. 3145. (*Stutelberg*, *supra*, 29 Cal.App.5th at pp. 316–317.)

11 The court in *Aledamat* explained, "We recognize that the rules regarding prejudice that we apply in this case are arguably in tension with more recent cases, such as *People v. Merritt* (2017) 2 Cal.5th 819, providing that the failure to instruct on the elements of a crime does not require reversal if those omitted elements are 'uncontested' and supported by '"overwhelming evidence."' (*Id.* at pp. 821–822, 830–832; see *Neder v. United States* (1999) 527 U.S. 1, 17–18.)

granted.) In *Stutelberg*, the court declined to follow *Aledamat* in applying "a *heightened Chapman* inquiry" under *Green* and instead applied *Chapman's* "traditional 'harmless beyond a reasonable doubt' framework."[12] (*Stutelberg*, *supra*, 29 Cal.App.5th at p. 320.) As to the deadly weapon enhancement, which was attached to a count of mayhem, the court found the error harmless, but as to a count of assault with a deadly weapon, which involved a different victim who was not struck with the box cutter and therefore not harmed, the court concluded the error was prejudicial. (*Id.* at pp. 321–323.)

We need not weigh in further on these issues, however, because this case is distinguishable on its facts. As set forth in part I, we rejected Estrada's and Lopez's positions that the inmate-manufactured weapons used here were not inherently deadly as a matter of law. To the contrary and unlike the box cutters in *Stutelberg* and *Aledamat*, Estrada's and Lopez's inmate-manufactured weapons were specifically designed as weapons and had no other use. Accordingly, no instructional error occurred here with respect to the definition of deadly weapon.[13]

That test would certainly be satisfied here, where [the] defendant never disputed that the box cutter was being used as a deadly weapon and where the evidence of such use is overwhelming. However, the case law we cite in this case is directly on point and remains binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456.) Any revisiting or reconsideration of this case law is for our Supreme Court, not us." (*Aledamat*, *supra*, 20 Cal.App.5th at p. 1154, review granted; cf. *People v. Brown*, *supra*, 210 Cal.App.4th at p. 12 [in appropriate cases, error involving legally inadequate theory can be harmless].)

12 Under the federal standard articulated in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), courts "must determine whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt*, *supra*, 2 Cal.5th at p. 831; accord, *Neder v. United States*, *supra*, 527 U.S. at p. 18; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663).

13 Based on our rejection of Estrada's claim on its merits, we do not address the issue of forfeiture raised by the People. However, we note that, as Estrada contends, where a "defendant asserts that an instruction is incorrect in law an objection is not required. (*People v. Smithey* (1999) 20 Cal.4th 936, 976–977, fn. 7; § 1259 ['The appellate court may … review any instruction given, … even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.'].) We apply this principle to all such instructional claims except to those where we explicitly conclude that defendant's failure to seek modification or clarification of an otherwise correct instruction resulted in forfeiture." (*People v.*

III. Ineffective Assistance of Counsel

Estrada claims his trial counsel rendered ineffective assistance of counsel in failing to object to Sotelo's testimony that inmate-manufactured weapons are deadly weapons. He faults counsel's failure to object on three bases: the testimony was wrong as a matter of law, it improperly expressed an opinion on the crime's definition, and it improperly expressed an opinion a crime was committed.

A. Legal Standard

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that [the] defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687–694.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Cunningham, supra,* at p. 1003.) "[I]n assessing a Sixth Amendment attack on trial counsel's adequacy mounted on *direct appeal*, competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney's choice." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260; accord, *People v. Stewart* (2004) 33 Cal.4th 425, 459.)

B. Analysis

At the outset, we reject Estrada's contention that the inmate-manufactured weapons were not inherently deadly as a matter of law and, therefore, Sotelo's testimony was incorrect as a matter of law. We resolved this issue against Estrada, *ante*. As well,

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Capistrano (2014) 59 Cal.4th 830, 875, fn. 11, overruled in part on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104; accord, *People v. Johnson* (2016) 62 Cal.4th 600, 639.)

we reject Estrada's characterization of Sotelo's testimony that the items were inmate-manufactured weapons as opining that a crime was committed. While it is improper for a witness to express an opinion whether a crime has been committed (*People v. Torres* (1995) 33 Cal.App.4th 37, 47), as Estrada argues, we do not agree Sotelo's testimony that the items found on the yard were inmate-manufactured weapons is akin to opining whether a crime was committed. Sotelo simply identified the items by their commonly known name, just as a witness might identify an item located or utilized as a gun, pocketknife or box cutter.

Turning to the other grounds, our inquiry is guided by the principle that "[i]t is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

The parties' main focus in this case was not whether the items were inmate-manufactured or whether they were deadly weapons within the meaning of section 245, subdivision (a)(1). Rather, Estrada and Lopez both focused on persuading the jury either they were not armed with the weapons during their fight with the victim or the prosecution had not met its burden of demonstrating they were armed beyond a reasonable doubt. Given the physical nature of the weapons and the absence of any purpose beyond use as weaponry, Estrada's trial counsel may have concluded that, tactically, it was best to avoid any unnecessary focus on the weapons themselves and that calling any further attention to the weapons by objecting to Sotelo's testimony would not inure to Estrada's benefit.

Moreover, there was no prejudice. "'When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" (*Hinton v. Alabama* (2014) 571 U.S. 263, 275, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 690.) Even if we were to attribute error to counsel's performance for the sake of argument, there is no reasonable probability of a different result had trial counsel objected to Sotelo's testimony that inmate-manufactured weapons are deadly weapons.

IV. Cumulative Error

Estrada also claims that, cumulatively, the trial court's instructional errors and trial counsel's rendering of ineffective of counsel resulted in prejudice. "In examining a claim of cumulative error, the critical question is whether [the] defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) Having rejected two of Estrada's three claims, there is nothing to cumulate and we necessarily reject his claim of cumulative error resulting in prejudice. (*People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Sedillo, supra,* at p. 1068.)

V. Prior Prison Term Enhancement

Relying on *People v. Jones* (1993) 5 Cal.4th 1142, Estrada claims the trial court erred in imposing a one-year sentence enhancement under section 667.5, subdivision (b) for serving a prior prison term when it also relied on the same prior offense to impose a five-year enhancement for a serious felony conviction under section 667, subdivision (a).[14] The People respond that there was no error because the court did not rely on the

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14 Estrada also asserts, "The factual premise of the probation officer's analysis that [case] Nos. NA081935 and TA120194 were served concurrently was wrong." We are unable to locate such an error and agree with the People that the probation officer correctly stated, "According to the defendant's abstract of judgement [*sic*] in case #NA081935-01, the counts were sentenced concurrently; thus, one prior may be used to satisfy the elements for the PC 667(a) prior, and the other conviction can be used for the PC 667.5(b) elements."

same prior offense in imposing both enhancements. Estrada does not further address the claim in his reply brief.

In *People v. Jones*, *supra*, 5 Cal.4th at page 1150, the California Supreme Court held that "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." In this case, the trial court imposed 2 five-year sentence enhancements based on Estrada's conviction for assault with a semiautomatic firearm (§ 245, subd. (b)) in case No. TA120194-01 and criminal threats (§ 422) in case No. NA081935-01. It also imposed a one-year sentence enhancement based on Estrada's conviction for assault with a deadly weapon (§ 245, subd. (a)(1)), also in case No. NA081935-01. Although the two enhancements at issue were imposed based on convictions suffered in the same underlying case, they were not imposed based on the same prior offense. Thus, Estrada's reliance on *People v. Jones* is misplaced.

We addressed this issue in *People v. Medina* (1988) 206 Cal.App.3d 986, which preceded *People v. Jones*. We held that where the prior offenses were separate and distinct, the trial court had discretion to impose sentences under sections 667 and 667.5. (*People v. Medina*, *supra*, at p. 992.) After *People v. Jones* was decided, we considered the issue again in *People v. Ruiz* (1996) 44 Cal.App.4th 1653. We concluded *People v. Medina* remains good law (*People v. Ruiz*, *supra*, at pp. 1670–1671) and held, "[T]he trial court did not err in imposing a five-year enhancement pursuant to section 667, subdivision (a)(1) based on appellant's prior robbery conviction, and a one-year enhancement pursuant to section 667.5, subdivision (b) based on appellant's prior conviction of second degree burglary and resulting prison term. This is so because the enhancements were based on different offenses. There was no requirement that the underlying convictions be based on charges which were 'brought and tried separately,' nor that appellant served 'separate prison terms' for those convictions" (*id.* at p. 1671, fn. omitted; accord, *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1054).

On these grounds, we reject Estrada's claim of sentencing error as to the imposition of the one-year enhancement under section 667.5, subdivision (b).

IV. Amendment to Section 667, Subdivision (a)(1)

Finally, when Estrada and Lopez were sentenced, the trial court was required to impose the five-year enhancement under section 667, former subdivision (a)(1), based on their prior serious felony convictions. However, effective January 1, 2019, section 667, subdivision (a)(1), and section 1385 were amended to permit a trial court, in the furtherance of justice, to strike or dismiss a five-year enhancement under section 667, subdivision (a)(1). (Sen. Bill No. 1393, ch. 1013, §§ 1–2.)

In supplemental briefing, Estrada and Lopez seek remand of this matter so that the trial court may exercise its discretion whether to strike their prior serious felony enhancements. The People agree with Estrada that the amendments to sections 667, subdivision (a)(1), and 1385 pursuant to Senate Bill No. 1393 apply retroactively because judgment was not final when the amendments took effect, and they join in his request for remand. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973; *People v. McDaniels*, *supra*, 22 Cal.App.5th at pp. 424–425.)

They argue, however, that because Lopez did not seek further review after we issued our opinion on July 18, 2018, judgment was final in his case and he is not entitled to remand.[15] Lopez responds the remittitur was recalled and, therefore, this court has jurisdiction over the matter and may remand it to the trial court for consideration of the amendments to sections 667, subdivision (a)(1), and 1385.

We agree with Lopez. "'Remittitur transfers jurisdiction back to the inferior court so that it may act upon the case again, consistent with the judgment of the reviewing

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15 "'[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 306; accord, *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 935.)

court.'" (*People v. Awad* (2015) 238 Cal.App.4th 215, 223, quoting *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 10.) However, a Court of Appeal may, on its own motion or on party's motion, recall the remittitur for good cause (Cal. Rules of Court, rule 8.272(c)(2)), thereby reasserting jurisdiction (*In re Grunau* (2008) 169 Cal.App.4th 997, 1002; *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 190–191). Having recalled the remittitur in this case, we have jurisdiction to remand the matter to the trial court.

Turning to the merits of Estrada's and Lopez's request, "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez, supra,* 58 Cal.4th at p. 1391.)

In this instance, at the time Estrada and Lopez were sentenced, the trial court was required to impose the prior serious felony conviction enhancement under section 667, subdivision (a)(1). Estrada and Lopez are entitled to be sentenced in the exercise of informed discretion and, therefore, remand is appropriate so that the trial court may exercise its discretion in the first instance in light of the amendments to section 667, subdivision (a)(1), and 1385. (*People v. Garcia, supra,* 28 Cal.App.5th at p. 973, fn. 3; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111; *People v. McDaniels, supra,* 22 Cal.App.5th at pp. 427–428.) We express no opinion on how the trial court should exercise its discretion on remand.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under Penal Code sections 667, subdivision (a)(1), and 1385 as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2, eff. Jan. 1, 2019) and, if appropriate following exercise of that discretion, to resentence Estrada and Lopez accordingly and provide a corrected abstract of judgment to the appropriate agencies. The judgments are otherwise affirmed.

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MEEHAN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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FRANSON, J.